

No. 17-70196

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL FAMILY FARM COALITION, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
et al.,
Respondents,
and

MONSANTO COMPANY,
Intervenor-Respondent.

On Petition for Review from the United States
Environmental Protection Agency

MOTION FOR LEAVE TO FILE BRIEF OF NATIONAL COTTON
COUNCIL OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF
INTERVENOR-RESPONDENT MONSANTO COMPANY

James E. Tysse
John Gilliland
Lide E. Paterno
AKIN GUMP STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
202-887-4000
jtysse@akingump.com

*Counsel for Amicus Curiae National
Cotton Council of America*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, *amicus curiae* National Cotton Council of America discloses that it does not have a parent corporation, nor does any publicly held corporation own 10% or more of its stock.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a), the National Cotton Council of America (NCC) hereby moves for leave to file the accompanying 7-page brief as *amicus curiae*. Pursuant to Circuit Rule 29-3, the NCC contacted all parties and endeavored to obtain their consent to file the attached brief in support of Intervenor-Respondent Monsanto Company. Although at least one *amicus curiae* brief in support of Petitioners was filed on the consent of all parties, *see* Br. of *Amicus Curiae* Dr. David A. Mortensen at 1 n.1, ECF No. 78, some of the parties took no position on NCC's proposed brief, thereby necessitating the present motion.

NCC and its members, which have a strong interest in the outcome of this petition for review, believe that the attached brief will aid the Court's review. NCC has a direct and substantial interest in the Court's disposition of this petition because it threatens to inflict serious hardship on NCC's 25,000-plus individual members, who annually cultivate between 9-12 million acres of cotton in the United States. NCC's brief complements, but does not repeat, the legal arguments asserted in the Respondent's and Intervenor-Respondent's briefs by providing factual context regarding the importance of dicamba herbicides to the economic competitiveness and productivity of U.S. cotton production. NCC's brief emphasizes the devastating effects to the U.S. cotton industry that would result

from removing dicamba from the national market, an important equitable consideration that counsels against granting Petitioners' request for vacatur. In addition, NCC is uniquely situated, by virtue of its distinctive perspective as the nationwide representative of the cotton industry, to explain why upholding the U.S. Environmental Protection Agency's 2016 Registration and 2017 Amendment of dicamba herbicides is vitally important to NCC, its members, and cotton-related industries.

The attached brief is timely given that Intervenor-Respondent Monsanto Corporation filed its principal brief 7 days ago, on April 23, 2018. No party has objected to, nor will any party be prejudiced by, the filing of this brief. Petitioners have ample time to incorporate a response to this brief into their optional reply brief due on May 14, 2018. *See* ECF No. 87 (Scheduling Order).

Respectfully submitted,

/s James E. Tysse

James E. Tysse

John Gilliland

Lide E. Paterno

AKIN GUMP STRAUSS HAUER &

FELD LLP

*Counsel for Amicus Curiae National
Cotton Council of America*

April 30, 2018

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ James E. Tysse

James E. Tysse

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jtysse@akingump.com

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STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, the National Cotton Council of America states that: (i) no party's counsel has authored this brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (iii) no person—other than the National Cotton Council of America, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

The National Cotton Council of America (NCC) is a national, not-for-profit trade association representing seven segments of the United States raw cotton industry. NCC represents more than 18,000 individual cotton growers in seventeen states across the southern portion of the United States, from California to Virginia. Its membership also includes thousands of ginner, warehousemen, cottonseed crushers and merchandizers, marketing cooperatives, merchants, and textile manufacturers that produce, handle, and process cotton and cottonseed grown and sold in the United States. Overall, NCC has 25,000 individual members.

NCC's grower-members annually cultivate between 9 and 12 million acres of cotton in the United States. Farms and businesses directly involved in the production, handling, and processing of cotton and cottonseed employ more than 125,000 workers and produce direct business revenue of more than \$21 billion each year. Accounting for the ripple effect of cotton through the broader economy, direct and indirect economic activity generated by the cotton value chain in the United States is almost \$100 billion annually, with employment surpassing 280,000 workers.

¹ Pursuant to Circuit Rule 29-3, NCC endeavored to obtain the consent of all parties to the filing of this brief, but was unable to do so. Accordingly, NCC has filed a motion for leave to file this brief pursuant to Fed. R. App. P. 29(a).

Given its unique perspective as the nationwide representative of the raw cotton industry, NCC submits this short brief to explain why upholding the U.S. Environmental Protection Agency's 2016 Registration and 2017 Amendment of dicamba herbicide is vitally important to NCC and its members.

ARGUMENT

NCC fully agrees with and joins the legal arguments made by Intervenor-Respondent Monsanto. Accordingly, it asks the Court to uphold the EPA's 2016 Registration and 2017 Amendment of dicamba herbicide, as well as to deny Petitioners' request for vacatur. NCC submits this short brief for two reasons: one, to provide factual context to the Court regarding the critical importance of dicamba herbicides to the economic competitiveness and productivity of U.S. cotton production, which supports the EPA's cost-benefit analysis under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); and two, to emphasize the devastating impact that a nationwide vacatur would have on the U.S. cotton industry.

As background, cotton production requires intensive weed management throughout the early stages of cultivation, including before planting, at planting, and following the post-emergence of the cotton seedlings. Intensive weed management efforts are necessary until the height of the cotton plants provides an adequate canopy shade to inhibit further weed emergence while also preserving

soil moisture. These agronomic practices have traditionally entailed, among other things, frequent tillage of soil between the rows of cotton plants, a method that imposes high costs, requires great fuel consumption, and presents substantial risks of damage to the cotton plants. The availability and high adoption rate of herbicide-resistant crops, however, has facilitated a shift among U.S. cotton producers to simpler, lower-risk crop-production systems that require less dependency on tillage and lower energy use because herbicides can target weeds without harming crops.² This has resulted in greater soil conservation, improved soil health, and reduced run-off from fields.

A herbicide's chemistry is generally classified by scientists according to its Mode of Action (MOA), which is the manner in which the chemistry interferes with the physiology of the affected plant. A particular MOA may be selective to one group of plants without affecting other plants. Reliance on a single MOA therefore imposes tremendous natural selection pressures on plants that do not exhibit physiological processes targeted by the MOA, thus leading to herbicide-resistant weeds. For example, pigweed (palmer amaranth), which is common in cotton-cultivated areas of the country, has developed resistance to multiple herbicides, including the pyriithiobac-sodium group and glyphosate. Although

² See Weed Science, *Special Issue: Herbicide Resistant Weeds*, WEED SCIENCE SOCIETY OF AMERICA (Vol. 60, 2012).

these herbicides continue to provide control of multiple weed species, a different MOA must be included to control pigweed and other weeds resistant to these and other herbicides.

The identification of new MOAs has continually declined, meaning U.S. cotton growers have access to a limited number of MOAs. NCC is unaware of any new MOAs for cotton under review by the EPA, nor is NCC aware of any that may be expected in the foreseeable future. Consequently, the importance of dicamba—a herbicide that historically has been registered for use on other crops, but which the development of herbicide-resistant cottonseed has rendered safe and cost-effective for use on cotton—cannot be overstated. While previous formulations of dicamba have been registered for many years, the EPA concluded that the new formulations registered for use on the dicamba herbicide-tolerant crops pose less risk than previous formulations.

In light of the foregoing, as required under FIFRA and this Court's precedent, the EPA properly conducted a "cost-benefit analysis," assessing the "economic, social and economic costs and benefits of the use of [dicamba]." *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001) (quoting *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1248 (9th Cir. 1984)). In registering the ingredient, the EPA weighed the potential harms of the new formulations against the proven benefits, and concluded that the latter significantly

outweigh the former. For example, Petitioners express concern (at 18-26) that dicamba herbicides may drift or run off their intended targets and that even targeted weeds may soon develop resistance. Setting aside questions about Petitioners' empirical support for these concerns, the EPA acknowledged these potential risks of dicamba use and mandated various mitigation measures to account for them, such as infield buffers, specific spray nozzles, weather-based prohibitions, development of resistance-management strategies, and an automatic two-year expiration date to allow modifications to the registration as necessary. *See* Br. of U.S. Env'tl. Prot. Agency, *et al.* at 40-43, ECF No. 92. In full view of these risks and in light of the available mitigation measures, the EPA determined that the substantial evidence of dicamba's benefits—including its effectiveness at combatting successive weed flushes throughout the growing season and its ability to reduce weeds that are resistant to other popular herbicides, like glyphosate—warranted registration. Thus, the EPA complied with its statutory mandate under FIFRA of ensuring that dicamba “will not generally cause unreasonable adverse effects on the environment.” 7 U.S.C. § 136a(c)(5)(D); *see also id.* § 136(bb) (defining “unreasonable adverse effects on the environment” with reference to “costs and benefits”).

The EPA, in fact, reached the same conclusion that cotton growers across the country have reached based on their experience: Dicamba herbicides are an

extremely effective tool whose potential harms can be safely cabined. Indeed, access to the dicamba chemistry in its improved formulations has become crucial to a grower's efforts to sustain weed control and effectively rotate MOAs. NCC's grower-membership estimates that at least 60% of over 12 million acres of upland cotton will rely on application of the dicamba herbicide this season alone. Without this crucial technology, growers would likely be forced to revert to older, costlier, and less-effective methods of weed control, including tillage, the use of labor crews to manually remove weeds, and the increased use of alternative (and less-effective) herbicide products. At the same time, cotton growers would continue to face a high price for the most advanced seed varieties available on the market, which in part reflects the costs manufacturers have already expended to develop the seeds' dicamba-resistant traits. Thus, cotton growers would be forced to pay a premium for a key property of seeds they cannot utilize, while paying higher weed management costs to offset its unavailability. And they would likely face this prospect for the foreseeable future, as the development of new seed varieties takes several years.

For all of these reasons, NCC agrees with the arguments in Intervenor-Respondent's brief (pp. 29-40) that the EPA fully complied with FIFRA. But even if this Court were to disagree with that conclusion, at a minimum the Court should deny Petitioners' request for a nationwide vacatur. Such a drastic remedy is

unavailable where, as here, the “trouble[s] vacatur would cause are severe.” *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 993 (9th Cir. 2012); *see also Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (explaining that agency rule should not be vacated “when equity demands” otherwise). As already explained, any decision by this Court to inhibit the use of dicamba chemistry would greatly disrupt significant investments and severely impact the productivity of the U.S. cotton crop. Depriving the nationwide market of dicamba would result in “economically disastrous” effects on the U.S. cotton crop and cascading harms to related industries, making vacatur wholly inappropriate in this case. *Cal. Communities Against Toxics*, 688 F.3d at 994.

CONCLUSION

For the foregoing reasons, *amicus curiae* National Cotton Council of America respectfully requests that this Court dismiss or deny Petitioners’ petition for review.

Respectfully submitted,

/s James E. Tysse

James E. Tysse

John Gilliland

Lide E. Paterno

AKIN GUMP STRAUSS HAUER &

FELD LLP

*Counsel for Amicus Curiae National
Cotton Council of America*

April 30, 2018

**CERTIFICATION OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1**

I certify that, pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionally spaced, has a typeface of 14 points or more and contains 1,475 words.

s/ James E. Tysse

James E. Tysse

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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